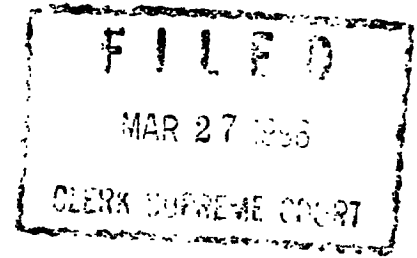


IN THE COURT OF APPEALS OF IOWA

No. 5-594 / 94-2131



000373

STATE OF IOWA,

Appellee,

vs.

ROBERT LEWIS SMITH,

Appellant.

Appeal from the Iowa District Court for Polk County, Joel D. Novak and Arthur E. Gamble, Judges.

Defendant appeals his conviction for third-degree sexual abuse in violation of Iowa Code section 709.4(1) (1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General; Sheryl A. Soich, Assistant Attorney General; John P. Sarcone, County Attorney; and Steven Foritano, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., Habhab, Cady, Huitink, and Streit, J.J.

PER CURIUM,

Robert Smith was charged by trial information with the crime of sexual abuse in the third degree, pursuant to Iowa Code section 709.4(1)(1993). Smith was convicted following a jury trial and subsequently sentenced. He now appeals. He contends that the trial court abused its discretion by denying a continuance requested by the prosecution and defense counsel and by refusing to conduct an appropriate hearing to determine whether different counsel should be appointed. We affirm.

The trial information against Smith was filed on June 30, 1994. Robert Powers from the Polk County Public Defender's office was appointed to represent him.

On August 29, 1994, Powers filed an application alleging Smith did "not wish to be represented by an attorney at trial." The application requested a hearing and "the matter resolved as to whether the defendant will be representing himself pro se, whether the undersigned will continue to represent him, or whether standby counsel should be appointed." That application was heard on September 1, 1994.

The record reveals the following:

MR. POWERS: . . . I would ask Mr. Smith for purpose of the record whether or not you told me you didn't want a lawyer.

DEFENDANT: I don't have to keep on explaining. . . .

THE COURT: . . . Are you requesting that you represent yourself in this matter?

DEFENDANT: I'm not planning on fighting the issue.

* * *

THE COURT: . . . My question is why is it you want to represent yourself and not have the help of an attorney?

DEFENDANT: Well, I mentioned I'm not fighting the case.

THE COURT: Pardon?

DEFENDANT: I'm not fighting the case you think you've got.

THE COURT: You said you're not fighting--

DEFENDANT: I'm not fighting the case you think you've got, the charges.

* * *

THE COURT: . . . Now, do you have any legal training? Do you have any legal training-- I just want to know do you have any legal background and that is why you feel satisfied you can represent yourself?

DEFENDANT: I decline what you are talking about.

THE COURT: You decline to talk about it?

DEFENDANT: Yes.

THE COURT: . . . What is it you are declining to talk about? I guess I still need to know do you desire to have an attorney in this case or not?

DEFENDANT: Are we planning on going to trial with this?

THE COURT: Are we planning on going to trial?

DEFENDANT: Yes.

THE COURT: Yes at some point in time I would assume that is true.

DEFENDANT: Well, you just go ahead then. I don't have anything to say. I am pleading no contest to this deal here.

THE COURT: Well the question I am asking today is are you still of a mind and opinion that you don't want to have a lawyer?

DEFENDANT: That's what I told you.

THE COURT: Okay. Well you didn't tell me on the record.

DEFENDANT: Yes, I told you that. I told this fellow and I told you I didn't want an attorney. I am not fighting the case.

Prior to the commencement of trial on November 7, 1994, certain matters were taken up out of the presence of the jury panel by the parties. No ruling had been entered on the application to proceed pro se. Smith told the trial judge he did not want Mr. Powers to represent him, but indicated he was not willing to waive his right to have an attorney. The following exchange took place between the court and Smith:

DEFENDANT: Are you telling me I can't rid of this lawyer here?

THE COURT: I want to know what Judge Novak

DEFENDANT: I mean are you waiving me the right of getting rid of this lawyer?

THE COURT: I think Judge Novak has considered that and probably already ruled on it. And if he's ruled on it, I'm not going to change his ruling. And I'm asking Mr. Powers to find out.

DEFENDANT: I mean this is my choice. It is not the judge's choice.

THE COURT: I want to know what Judge Novak has ruled.

DEFENDANT: Wait a minute. Ain't this my trial here? Don't I have a chance to get rid of this lawyer?

MR. POWERS: I think what the judge is saying . . .

DEFENDANT: That's what I'm saying-- Wait a minute. Wait a minute. This is what you keep on going by. You are representing me. And I'm trying to tell you if you keep this fellow to represent me, you go ahead and get the trial on your own. I think I got a right to get rid of this lawyer.

THE COURT: I want to know whether Judge Novak has ruled on that question or not. If he's already ruled, then I'm not going to change his ruling. If he hasn't ruled, then I'll consider it.

DEFENDANT: Wait a minute. Wait a minute. You fail to understand. I'm supposed to get rid of this lawyer. It's my right to get rid of the lawyer here. It's not the judge's right, it's my right to get rid of the judge--the thing that got me here.

THE COURT: I told you what I'm going to do, sir; and that's what I'm going to do--we're not going to argue.

DEFENDANT: Don't ask me no questions then. You're going to have the trial without me.

Prior to proceeding with the trial, it was discovered Smith's earlier request to proceed pro se was denied. The trial judge was then advised by counsel that Smith would have no objection to a different lawyer from Mr. Powers' office to represent him. It was then requested by the assistant county attorney and Mr. Powers that the court give Smith a new public defender and the trial be continued for two weeks to allow the new attorney to prepare.

The trial judge addressed Smith, indicating he would be willing to continue the matter for two weeks so that a new lawyer could become familiar with the file and defend him. However, he further indicated he wanted Smith to agree there was good cause for the continuance and that his right to a speedy trial was not being violated.

The following then took place:

DEFENDANT: My right is being violated. I asked for an attorney months ago.

THE COURT: Okay.

DEFENDANT: Three months ago, almost.

THE COURT: All right.

DEFENDANT: When we first started in.

THE COURT: Well you give the court very little choice but to proceed with the jury trial today and have you represented by Mr. Powers.

DEFENDANT: No, I asked for a lawyer way before today, though.

THE COURT: Do you give up your right to a speedy trial?

DEFENDANT: No, I'm not giving up my right to a speedy trial. That's why I asked for a lawyer before today.

THE COURT: All right.

The matter then proceeded to trial. The record shows Smith failed to cooperate with Mr. Powers and during the trial feigned sleep.

Smith initially contends that the trial court abused its discretion by denying the continuance requested by the prosecution and defense. A ruling on a motion for a continuance is a matter committed to the sound discretion of the court and will be reversed only when an abuse of discretion is shown. *State v. Teeters*, 487 N.W.2d 346, 348 (Iowa 1992); *State v. Slayton*, 417 N.W.2d 432, 435 (Iowa 1987). In order to show an abuse of discretion, the defendant must show that it was exercised on grounds

clearly untenable or to an extent clearly unreasonable. *State v. Mattly*, 513 N.W.2d 739, 741 (Iowa 1994); *State v. Schaffer*, 524 N.W.2d 453, 455 (Iowa App. 1994). The ruling must also prejudice the defendant. *See State v. Traywick*, 468 N.W.2d 452, 355 (Iowa 1991).

We agree with Smith a motion for continuance should not be granted only upon the condition the defendant waive his right to a speedy trial. Courts may place reasonable conditions on the grant of a continuance, but may not force a defendant to waive a constitutional right to gain a continuance. Nevertheless, to the extent the court's remarks imposed an unreasonable condition, we are unable to find prejudice. There is no showing counsel did not adequately defend Smith at trial, or a continuance would have changed the result of the trial.

Smith next contends the trial court abused its discretion by refusing to conduct an appropriate hearing to determine whether different counsel should be appointed. Under the particular circumstances of this case, we are unable to find an abuse of discretion. Moreover, the trial court was presented with a motion for continuance, not a complaint about counsel.

AFFIRMED.